Filed 9/14/15 P. v. Cox CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. KEVIN DARNELL COX, Defendant and Appellant.	E059481 (Super.Ct.No. SWF026784) OPINION

APPEAL from the Superior Court of Riverside County. Christian F. Thierbach and F. Paul Dickerson, III, Judges. Affirmed.

Sharon G. Wrubel, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Charles C. Ragland and Scott C. Taylor, Deputy Attorneys General, for Plaintiff and Respondent.

In October 2008, defendant and appellant Kevin Darnell Cox and three of his fellow United States Marines, Tyrone Miller, Emrys John and Kesaun Sykes, went to a home belonging to United States Marine Corps Sergeant Janek Pietrzak and his wife, Quiana Jenkins-Pietrzak. Janek and Quiana[1] were both tied up with duct tape. Quiana's clothes were removed and she was sexually assaulted with a vibrator. Janek was beaten. They both were then shot in the head several times. Defendant and his cohorts stole jewelry and other items from the home. They attempted to set the entire house on fire but were unsuccessful.

Defendant was found guilty of the first degree murders of Janek and Quiana, and several special circumstances. Defendant received a sentence of life without the possibility of parole.[2]

Defendant now contends on appeal as follows:

1. The trial court abused its discretion and violated his due process right to a fair trial by refusing to recuse the Riverside County District Attorney's Office due to a conflict, or at a minimum, forbid some of the deputy district attorneys in the office from working on the case. This was structural error requiring automatic reversal.

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[1] We refer to the victims by their first names not out of disrespect but for ease of reference.

[2] Miller and John were also found guilty of all the charges except that the jury found the special allegation that John was engaged in sexual assault not true. Both received the death penalty.

2. The trial court violated his Sixth and Fourteenth Amendment rights to confrontation and a fair trial by refusing to allow him to cross-examine Miller regarding several unadjudicated prior residential burglaries committed by Miller.

3. The instruction on prior acts evidence (CALCRIM No. 375) was erroneous and violated his Fourteenth Amendment right to a fair trial.

4. The trial court erroneously admitted evidence of a sexual gesture made by John in defendant's presence several days after the murders and allowing the prosecutor to infer that this was in relation to the sexual assault on Quiana.

5. Cumulative error warrants reversal.

We find that there were no prejudicial errors warranting reversal of defendant's conviction.

PROCEDURAL HISTORY

The District Attorney of Riverside County sought the death penalty for defendant and the others. The matter was tried before two juries: one for defendant, and one for Miller and John.

Defendant was found guilty of the first degree murders of Quiana and Janek (Pen. Code, § 187, subd. (a)).[3] He was also found guilty of the special circumstances for both murders that they were committed during the commission of a burglary (§ 190.2, subd. (a)(17)(G)) and robbery (§ 190.2, subd. (a)(17)(A)). He was found guilty of the special circumstance of multiple murder with the meaning of section 190.2, subdivision (a)(3).

[3] All further statutory references are to the Penal Code unless otherwise indicated.

His jury found not true the special circumstance that he committed the murder of Quiana while engaged in the commission of penetration by a foreign object (§ 190.2, subd. (a)).

The jury chose not to impose the death penalty and set the penalty at life without the possibility of parole.

FACTUAL HISTORY

A. PEOPLE'S CASE-IN-CHIEF

1. *BACKGROUND*

Janek, a Sergeant in the United States Marine Corps stationed at Camp Pendleton, and Quiana, were married on August 8, 2008. In June 2008, they moved into a house they bought at 31319 Bermuda Street in French Valley, which is in Riverside County. They had an alarm system in their house. The keypads for the alarm system were in the master bedroom and the kitchen area. There were photographs of both Janek and Quiana in the entryway to their house. They had a small dog.

Quiana spoke with her mother at 8:00 p.m. on October 14, 2008. Quiana's mother heard Quiana set the alarm to the house while they talked. Quiana's mother sent Quiana a text at 9:47 p.m. telling her good night, but received no response.

On Wednesday, October 15, Janek did not show up for work. Janek's supervisor called his cell phone; Janek did not answer. Janek's supervisor called the Riverside County Sheriff's Department at 9:00 a.m. and they offered to check the house. Quiana also did not show up for work on October 15 and her supervisor contacted law enforcement to check on the house.

Miller was a Lance Corporal in the United States Marine Corps and reported to Janek. John had also reported to Janek but had been transferred several months prior to the murder. John lived in the barracks at Camp Pendleton and Miller lived in base housing with his wife and children. Defendant worked in the same building as Miller and John at Camp Pendleton but was not supervised by Janek.

2. *CRIME SCENE*

Riverside County Sheriff's Deputy Matthew Hughes received the call to check on the Pietrzak's house. When he arrived at the house, the front door was ajar. Deputy Hughes called for backup. Right inside the front door, a purse was dumped on the floor. A cabinet door was open. The house smelled of natural gas and gasoline. Janek and Quiana were dead in the living room. There was no one else in the house. A small dog was contained in the master bedroom. There were no obvious signs of forced entry.

Sergeants Gary LeClair and Benjamin Ramirez were assigned to investigate the homicide. A screen on a kitchen window had been removed and was on the ground. The screen on the sliding glass door was partially open. Shoeprints were found on a tile walkway where the purse was on the floor. A knife was on the center of the table in the living room. Open alcohol bottles were on the floor.

There was a pool of blood on the floor in a location away from where Quiana and Janek were found. It appeared someone had been bleeding in the area. Janek had dripping blood stains on his knees and legs. He was bleeding from his head. He appeared to have been assaulted before he was shot. He had bruising on his right side and back that had a shoe pattern. Both his wrists were bound with red duct tape. His

ankles were bound with the same tape. His right wrist was secured to his ankles. A sock had been placed in his mouth and secured with duct tape. He came to rest kneeling down with his head facing a pillow.

Quiana was naked. Quiana's wrists were bound behind her back with the same red duct tape. A sock had been placed over her eyes and secured by tape. She had tape on her chin area. A vibrator and red candle were found "between Quiana's legs." There were batteries in the vibrator. A "C" was spray painted on Quiana's stomach. The vibrator was tested and had DNA from Quiana.

Based on the stippling and soot on Janek's face, Janek was shot once at close range with no barrier between him and the gun. However, Quiana had pillow cushion stuffing in her hair indicative of a pillow being between her and the gun. There were two bullet holes in a couch cushion found near Quiana's body. There was soot on one side of the cushion and blood on the other side. A bullet hole and projectile were found in the arm of the sofa.

A nightgown with the straps cut off was found in the upstairs master bedroom. A role of red duct tape was found in the master bedroom. Packaging for the vibrator was found in the master bedroom. The master bedroom was ransacked. Drawers were open and clothes were on the floor. A spot on the dresser, where there was no dust, was the size of a jewelry box; no jewelry box was found. Downstairs cabinets were opened and closets were opened. Cabinets in the garage had been opened and there were items on the garage floor.

Racial messages were spray painted on the master bedroom and bathroom walls. A spray paint can was found on the dining room table. No fingerprints were found in the house. Numerous shoe print impressions were made.

There was a red gas can on the family room floor. A mop stick and the charred remains of a T-shirt at the end of the mop stick, which contained ignitable liquid, were found on the family room floor. There was liquid poured throughout the house and on Janek and Quiana. There was a shoe print in the liquid. A small burnt piece of cloth was on the tile floor in the entryway. A gas can that contained flammable liquid was found in the kitchen.

There were several burn areas on the carpet and the wood floor on the second floor. There was a splash pattern of ignitable liquid on the walls. The only explanation of the burned areas was arson. The gas knobs on the kitchen stove were turned on. This could cause an explosion in the house. The gas to the house was turned off. Gasoline was found on the burned areas of carpet.

Jewelry was missing from the house including a men's Movado watch with a black face and diamond; a pearl necklace, earring and bracelet set; a silver men's bracelet with a black inlay; a men's gold chain with a pendant; a women's gold chain necklace with a three diamond pendant; a men's wedding ring; and a women's wedding ring set, including an engagement ring and wedding band. No wedding rings were found on Janek and Quiana.

The alarm system at the house was working properly at the time of the murders. If a window or door was broken, a loud siren would have sounded. If the front door had

been opened and the alarm had been set, there would have been a 30- or 45-second delay to turn it off before an alarm would sound.

On October 15, 2008, at about 3:30 a.m., at an ATM located in Fallbrook, money was withdrawn from the Pietrzak's joint bank account. A personal identification number (PIN) would have been required to make the withdrawals. Surveillance video showed the person making the withdrawal covering the camera with his hand. The ATM was located just outside a gate leading to Camp Pendleton. That gate was the quickest way to get from the Pietrzak's house to Camp Pendleton.

3. *AUTOPSIES*

Quiana was five feet, five inches tall and weighed 114 pounds. There was paint on the left side of her abdomen. She had a gunshot wound to the upper back of her neck. The muzzle of the gun would have been touching her skin or was very close when it was fired based on the soot in the wound. There was white cotton on her neck, showing something was between the barrel and skin. Another gunshot wound entered the right side of her at the forehead and went through her skull and brain. There was no sexual trauma to her mouth or anus. The vibrator found would not necessarily cause trauma. It did not mean she was not sexually assaulted. The gunshot wound to her head was fatal.

Janek was five feet, 10 inches tall and weighed 193 pounds. He had three gunshot wounds to his head. He had bruises on his left arm and abdomen. He had a pattern wound to his back that was consistent with a shoe pattern. The injuries were consistent with being kicked. The three gunshot wounds to his head were fatal. A fragment of a

projectile was found in his head. An intermediary may have been used for one of the shots.

4. *SEARCHES AND ANALYSIS OF EVIDENCE FOUND*

a) Miller's Residence

Miller's residence at Camp Pendleton was searched on October 29/30, 2008. A blue bandana was found in the laundry room. A piece of paper with the Pietrzak's address was found under a sofa cushion in the family room. A gold bracelet with black inlay inscribed with Quiana's and Janek's name was found in the master bedroom. A man's wedding ring and gold necklace with a pendant were also found. Two debit cards bearing Quiana's name were found in the master bedroom.

Bolt cutters, ammunition, gloves, handcuffs and a handgun magazine were found inside a backpack in the closet. Another backpack contained four blue bandanas, gloves, a black sock and a black sweatshirt. A Beretta 92FS nine-millimeter pistol (92FS) and a 92D Beretta nine-millimeter handgun (92D) were found. Four nine-millimeter casings were found in a baggie. Other guns—a Colt .32-caliber pistol, Colt .45-caliber handgun, five rifles and a sawed-off shotgun—were also found. A Marine Corps dress blues jacket with Sergeant patches on the arms was found.

The 92FS and 92D pistols found in Miller's home were the only ones capable of firing nine-millimeter rounds. The four cartridge cases found in the baggie were fired from the 92FS. Only one projectile found at the crime scene was sufficient to make a comparison of the projectile to the gun. The projectile was fired from the 92FS.

The gloves that were found in a backpack at Miller's residence had the name Miller written on the tag inside. The gloves had what appeared to be silver paint stains on them. DNA from the outside of the gloves matched Quiana. There was a significant amount of DNA on the glove. This was consistent with the glove being in contact with Quiana's vagina or the vibrator, which had her DNA.

The blue bandanas that were found in the backpack at Miller's house had blood on them. The blood on one of the bandannas was tested and the DNA matched Janek.

b) John's Barracks

John's room was searched on October 30, 2008. There was a blue bandana with white markings found under his bed. Black gloves were found in a backpack. Nike Cortez shoes found in John's barracks had markings on the sole that were similar to the pattern injury on Janek's back. Blood found on the shoes matched Janek's DNA. A folded blue bandana was found in his car.

c) Melissa Buck's Apartment

Melissa Buck's apartment was searched on November 2, 2008. Several persons were present, including Sykes. A two-piece wedding ring set was found on a countertop. A yellow metal necklace with a pendant containing three vertical stones was found in the bathroom. A laptop was found. Xbox and video games were found in the living room.

In a room where a driver's license and Social Security card bearing Sykes's name were found, a pearl ring and thumb drive were on the nightstand. In another bedroom, two shotguns were found in the closet. Inside a jewelry box found in a closet in the hallway, there was stationery with the letterhead of Quiana's work. There was also a

baggie containing a Movado black watch and other jewelry. The wedding set found was identified by Quiana's mother as belonging to Quiana. The pendant and pearl jewelry also belonged to Quiana. The jewelry box was owned by Quiana. The Movado watch belonged to Janek. Nothing belonging to defendant was found in Buck's apartment.

5. *SEXUAL GESTURE*

Jeffrey Gallego was a United States Marine assigned to a unit at Camp Pendleton in 2008. On the night that Janek and Quiana were killed, John knocked on Gallego's door around 2:00 a.m. and was "giddy" and "hyped up." The next day or so, Gallego saw John and defendant together in a smoking area on the base. Gallego observed John take one hand and make a tube, and then put a finger from his other hand in and out of the tube. Both John and defendant started laughing. Gallego had never seen John make that gesture before that day.[4]

6. *PRIOR OCEANSIDE HOME INVASION ROBBERY*

Eric Thomason and Nancy Balcombe and their child, lived in an apartment in Oceanside. On September 19, 2008, a young Black male opened the door to their apartment. He was wearing a bandana over his face and was holding a gun. He told Thomason to get down on the floor. Thereafter, three Black males, one White male and a Black female entered the apartment and began ransacking the apartment. At least four of them had guns. They asked Thomason for cocaine and guns.

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[4] Gallego also testified that he thought the gesture looked like a "pussy" and "they were fucking it with something." That evidence was stricken, as will be discussed in further detail, *post.*

Balcombe was in bed. She was just waking up and felt someone touching her breast. A Black male pointed a gun at her face. She begged him not to rape her. She was brought downstairs. Someone took her jewelry box. The group kicked and stomped on Thomason. He had a hurt ankle and they concentrated on kicking it. They broke his tooth by hitting him with a pistol. They put a pillow to his head and put a gun to the pillow. Thomason moved the pillow and told them they would have to look into his eyes in order to shoot him. Balcombe grabbed the gun and pushed it away.

They took numerous items, including Thomason's laptop, an Xbox gaming system, a video game, Balcombe's jewelry and $1,500 cash. The thumb drive found in Syke's bedroom had a picture of Balcombe on it. Balcombe's jewelry box was found at Buck's apartment.

7. *JUSTIN WEISSINGER'S TESTMONY*

Justin Weissinger arrived at Camp Pendleton in January 2008. He became friends with Miller, John and defendant. Weissinger participated in the Oceanside robbery with defendant, Miller, Sykes and Buck. Buck told defendant that she had been ripped off when purchasing marijuana from a drug dealer. They planned to get the money back from the drug dealer and take other items. They drove in Miller's car to the location in Oceanside. They all put on gloves and covered their faces.

Miller and Weissinger were armed when they entered the apartment. They pointed their guns at Thomason and had him lie face down on the floor. They took money and marijuana from a safe. Miller and Weissinger brought Balcombe downstairs.

Defendant and Miller punched and kicked Thomason even though they already had the marijuana and money. They all went back to Buck's apartment and split up the cash.

Miller told Weissinger that he did not like Janek. Weissinger had been in custody from October 1, 2008, through October 19, 2008, on an unrelated matter. When he returned to work on October 20, he found out that Janek and Quiana had been killed.

Miller told Weissinger that he, John, defendant and Sykes went to Janek's house with masks on and they were armed. They rang the doorbell. Janek answered his door holding a knife but they forced their way in. They restrained Quiana and Janek and assaulted Janek by punching, kicking and stomping on him. Miller said they found jewelry in the house. They were upset because they thought that Janek would have more expensive items. Miller also said "we" used an object to penetrate Quiana's anus and vagina. They pulled a cushion off of the couch and ordered Janek and Quiana to kneel facedown, facing the couch.

Miller ordered John to kill Janek and Quiana. John put the couch cushion to Janek's head and shot him in the back of the head. He then put the cushion to Quiana's head and shot her in the back of the head. When Miller told John that Janek was not dead, John shot him again in the back of the head without the cushion. Miller told Weissinger that they tried to burn the house down by pouring alcohol and a sugary mixture on the floor but the fluids did not catch fire. Miller said they picked up the shell casings.

While Miller and Weissinger were talking, John joined the conversation. John admitted he shot Janek and Quiana. After the first conversation, Weissinger had a second

conversation at which John, Miller and defendant were present.[5] They spoke generally about the robbery and murders. They spoke about sticking an object into the anus and vagina of Quiana.[6]

Weissinger owned the 92FS handgun and Miller owned the 92D. Weissinger did not recall what he did with the 92FS handgun when he went into custody in October 2008. It ended up in a backpack he took to Miller's house.

On October 23, 2008, several days after the murders, Miller, John and Weissinger were driving in Miller's car looking to commit another burglary. Weissinger had the 92FS handgun on the back seat next to him. Miller stopped suddenly and it accidently discharged. Miller was shot in the right buttock.[7]

Weissinger disclosed many details of the murders to the sheriff's investigators that had not been disclosed to the press or reported on. For example, he knew that Janek had a knife, the fact that a seat cushion was used during the shooting, and that the casings were collected.

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[5] Weissinger was interviewed several times before trial. He initially did not state that defendant was involved in the conversations.

[6] Weissinger could not specifically recall defendant talking about the sexual assault.

[7] A sheriff's deputy went to a hospital in Vista based on a report of a gunshot victim on October 24, 2008. John was outside the hospital. Miller was in the hospital and had been shot.

8. *MELISSA BUCK*

Melissa Buck met defendant and Sykes in the summer of 2008. She was dating defendant in October 2008. Buck lived with Sykes and his girlfriend. Buck found out that defendant had a wife and kids around the time of the Pietrzak's murders.

Buck admitted participating in a home invasion robbery in Oceanside with defendant, Miller, Sykes and Weissinger. They all wore bandanas over their faces. She ended up with $100 cash. Defendant kicked Thomason because Thomason talked about finding them later. They took a purse, jewelry box and Xbox.

One night in October 2008, defendant, Miller, Sykes and John were at her apartment but left between 10:00 or 11:00 p.m. They came back around 2:00 or 4:00 a.m. John was carrying a shotgun and they smelled like gunpowder. They were carrying a jewelry box. She heard Miller and defendant say that "E" had earned his stripes and had done a good job. Buck claimed she took Quiana's wedding ring set from a plastic baggie that she found in an apartment closet.

Buck's statements to sheriff's investigators prior to trial were admitted. She told police Quiana's rings were given to her several months before, but then admitted that defendant had given them to her a few weeks before. She heard Miller and defendant say, "Good job E you earned your stripes tonight." Defendant said that "E" grew up that night. John responded, "Yeah, I did man. Yeah I did."

9. *DEFENDANT'S STATEMENT TO POLICE*

On October 30, 2008, defendant was interviewed by Sergeant LeClair. Defendant had been late for work on October 15 because he claimed he was staying with a woman

named Juanita. He had gone to her house at 7:00 or 8:00 p.m. the prior night. Defendant could not remember the address. He denied being with Miller in Temecula. Sergeant LeClair lied and told defendant that he was seen on a camera in Temecula and that his DNA was found in Janek's home. Defendant could not explain how his DNA was in Janek's home. Sergeant LeClair advised defendant he was just trying to figure out the role each person played in the murders of the Pietrzaks.

Defendant then admitted he, Miller and two other men went to the Pietrzak's home. One man was known as "Psycho." A man named "E," who he later admitted had the last name John, drove them there. Defendant claimed he did not know it was Pietrzak's house that night but realized it the next day. Defendant was "really fucked up" when they got to the house.

Miller, John and Psycho put bandanas on. They grabbed gloves, handguns and shotguns out of the back of the truck. They went inside the house. Defendant heard gunshots coming from the house. He went in the house. The others told him they were leaving and carried bags out of the house. Defendant insisted he stayed in the truck until he heard shots fired.

Defendant then said they enlisted him to ring the doorbell at the house when they arrived because they could not find a way in the house. Someone came to the door and defendant ducked away. Defendant waited by the car. Defendant eventually went inside. He went upstairs and saw them going through stuff. He saw someone on the floor in the downstairs living room. John had a gun pointed at him. Defendant and John carried bags to the car. Defendant went back inside. He saw a man lying on the couch. A female was

also in the living room and was taped up. She was naked. There was blood on the floor. He went back outside.

Defendant heard loud bangs. He went back inside and told them they had to go. He observed one of them with a stick with a towel on it on fire that he threw upstairs. He heard more gunfire. He went further inside and saw the woman and man on the floor. There was blood everywhere. They all went back to the car. John was carrying a pistol when he came back to the car. They drove to a gas station in Fallbrook. They then drove him to "Juanita's" house.

Defendant claimed that when they first started going to Janek's house, he thought they were going to rob a drug dealer. Defendant was never near Quiana. On the ride home, Miller and Psycho were laughing that they cut off the woman's nightgown and were making buzzing noises. Miller spray painted "C" on her. They claimed they did not rape her.

B. DEFENSE EVIDENCE

1. *JOHN'S EVIDENCE*

John presented evidence that he was not at Buck's apartment in Fallbrook on October 14, 2008, or October 15, 2008.

2. *MILLER'S EVIDENCE*[8]

Miller testified that on October 14, 2008, he was told that he was going to be promoted to Corporal. Janek approached him on that same day and told him he did not

[8] Miller also presented an expert on alcohol consumption but that was not heard by defendant's jury.

like him; he would make sure that Miller did not get promoted. Miller went home and drank two bottles of hard liquor. John came over and Miller told him what Janek said to Miller. Miller wanted to speak with Janek. He and John went to Buck's apartment. Defendant and Sykes were at the apartment. Miller decided they would go speak with Janek but they did not intend to rob or hurt him. Miller took the 92FS.

Miller, John, Sykes and defendant approached the door. Miller was wearing a bandana around his neck but it was not covering his face. Defendant knocked on the door. Janek opened the door holding a big knife. Janek told them to "Get the fuck out of here." Miller asked him about his promotion. Janek got in a defensive position and said, "Fuck you. What are you going to do about it?" Janek called Miller a "pussy." Miller then handed his gun to someone else and punched Janek. They started to fight. The next thing Miller remembered he was upstairs and some of the group were tearing up the room. One of them had Quiana. Miller was told to cut the straps off Quiana's nightgown. Miller denied he sexually assaulted Quiana.

Quiana was brought downstairs. Miller asked Janek for his PIN number and hit Janek until he disclosed it. Miller found some spray paint and spray painted "nigger lover" on the walls and spray painted Quiana in order to throw off the police. He threw alcohol around the house. He heard gunshots but did not know which of them fired a gun.[9]

[9] Miller later told the police that John shot them so they would not get caught.

Miller was in shock at first. He then ran out of the house because he was scared and the others came out after him. He withdrew the money from the ATM. He had a bandana covering his face and wearing gloves. He took Janek's dress uniform.

Miller denied that he ever told Weissinger what had happened. Weissinger had accidentally shot him but he made up a story to cover up so Weissinger would not get in trouble.

Miller admitted being involved in the Oceanside robbery with Buck, Sykes, defendant and Weissinger. Miller helped Buck take property from the residence. Miller denied he had any sexual contact with Balcombe.

Miller told the sheriff's investigators prior to trial that defendant was with them at the Pietrzak's home. Miller stated as to defendant, "He had an equal part. He was there the entire time. He helped ransack. He helped paint shit on the walls." Miller also said, "He helped beat Sgt. P up. He ahh . . . he had a . . . he was there and did . . . he did a lot . . . . Actually, the truth, he had an equal . . . very equal part." Miller claimed it was defendant's idea to burn down the house and that defendant began pouring alcohol around the house. Miller said that defendant taped up Quiana, but did nothing with her. Defendant had some of the jewelry and the jewelry box.

Defendant found the vibrator. He gave it to Sykes and he started "messing with her upstairs." Sykes took off her clothes. Sykes touched her on her breasts and bottom. Sykes brought her downstairs and put the vibrator in her vagina and anus. Defendant took the vibrator from Sykes and used it on Quiana. Miller denied being involved in the assault of Quiana but could not explain why he had her DNA on his gloves.

Defendant's counsel was able to cross-examine Miller. Miller denied that the statements he made in the pretrial interview about defendant's involvement were true. He did not see defendant the entire time. Defendant did not subdue Quiana. Miller only said that defendant had sexually assaulted Quiana because he wanted to tell the police what they wanted to hear. Miller and Weissinger were in the car driving to "possibl[y]" commit another burglary when Miller was shot.

3. *DEFENDANT'S EVIDENCE*

Defendant presented a firearms expert who stated that a Beretta 92FS would not accidently discharge if it fell off a car seat in a moving vehicle.

Weissinger was recalled. He was released from custody on the morning of October 20, 2008. Weissinger owned the Beretta 92FS. Weissinger could not recall what he did with the Beretta 92FS while he was in jail or recall how the gun ended up in the backpack in Miller's residence. The night that Miller was accidently shot, they were going to commit another burglary.

Defendant's sister and mother insisted that defendant lived in an apartment in Vista in October 2008, not with Buck. Defendant's former girlfriend testified that defendant was never violent with her or their son. He never did anything sexually inappropriate. They never used a vibrator.

DISCUSSION

A. RECUSAL MOTION

Defendant contends that the trial court erred and violated his federal due process right when it refused to recuse the entire Riverside County District Attorney's (DA) office, or in the alternative, the deputy district attorneys who were working on his case.

1. *ADDITIONAL BACKGROUND*

Jeffrey A. Van Wagenen, Jr., was appointed defendant's counsel on February 18, 2009. On October 8, 2010, Van Wagenen was relieved as counsel for defendant because he was hired by the DA's office. Defendant was appointed new counsel.

On June 17, 2011, defendant filed a motion to recuse the DA's office. Defendant submitted declarations from members of the DA's office.[10] Defendant's counsel argued that recusal of the entire DA's office was necessary under section 1424 because there was an actual and apparent conflict of interest due to disclosures by Van Wagenen, as detailed *post*.

According to Van Wagenen's declaration, he began working at the DA's office as a supervising deputy district attorney on January 3, 2011; he supervised the writs and appeals unit. Prior to his employment at the DA's office, he represented defendant from February 8, 2009, to October 8, 2010. Deputy District Attorneys Ivy Fitzpatrick and Daniel Delimon were assigned to the case.

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[10] These declarations were prepared by the DA's office to disclose the information.

When Van Wagenen started at the DA's office, a conflict policy was imposed that provided he was not to have any exposure to cases in which he had represented the defendants. Van Wagenen declared, "Unfortunately, on the afternoon of April 5, 2011, there was a lapse in these procedures." Van Wagenen spoke with Fitzpatrick in general about Post Traumatic Stress Disorder (PTSD). Van Wagenen then told Fitzpatrick about a book he had read called "'On Killing'" that had been written by a military colonel. Van Wagenen then "made the mistake" of telling Fitzpatrick that he obtained the book in preparation of a defense in defendant's case.

On April 6, 2011, Van Wagenen was approached by Deputy District Attorney Alan Tate and Supervising Deputy District Attorney Elaina Bentley. Bentley advised Van Wagenen that he may have breached the conflict policy. It was immediately decided that Van Wagenen would work with Tate to prepare a disclosure statement to be given to defense counsel. Van Wagenen stated he had made a mistake but would not repeat it.

According to Fitzpatrick, she had assisted Delimon with legal issues on defendant's case. She was preparing to leave for the day on April 5, 2011, when Van Wagenen came to her office. She was working on a PTSD legal issue for another case and asked Van Wagenen a general question about PTSD. Van Wagenen asked her if she had ever read the book "On Killing." He told her it was about how Marines are taught to fight and kill. He then volunteered that he contemplated using the book in his defense of defendant. Van Wagenen immediately acknowledged that he should not have said anything. He did state that it should be obvious to the prosecution that such a defense would be used. Fitzpatrick told Deputy District Attorneys Michael Hestrin, Tate and

Jared Haringsma. She had never told Delimon and would not tell him. She believed that Delimon had already anticipated such a defense.

Bentley provided a declaration. Van Wagenen had been walled off from defendant's case when he was hired. Bentley advised Tate and Fitzpatrick not to disclose the details of the disclosure by Van Wagenen; Bentley was advised generally that Van Wagenen had disclosed a defense theory for defendant's case. Delimon was never involved in the discussions. Fitzpatrick was admonished by Bentley to immediately arrange an in camera hearing with the trial court to disclose the information. Hestrin, Haringsma and Van Wagenen were advised not to discuss the matter with anyone. They were walled off from the case. Delimon was advised to have no conversations with Hestrin, Haringsma, Fitzpatrick or Tate about defendant's case. Delimon was not to participate in the in camera hearing regarding the matter. Tate alone helped Van Wagenen prepare his declaration.

Hestrin declared that Fitzpatrick told him Van Wagenen had contemplated a PTSD defense when Van Wagenen represented defendant because defendant had been trained to kill. Fitzpatrick wanted to disclose the statements but did not know how to handle it. Hestrin declared that he would not discuss the matter with anyone in the DA's office. Haringsma also declared that he had been told by Fitzpatrick that Van Wagenen told Fitzpatrick that Van Wagenen had planned a PTSD defense for defendant. Haringsma and Fitzpatrick agreed it should be disclosed to the defense. Haringsma warned Fitzpatrick not to discuss the issue with Delimon. Haringsma declared that he had not told anyone about the incident and would not discuss it with anyone.

Tate declared that he was assigned to the DA's writs and appeal division and was supervised by Bentley. Fitzpatrick worked in another office. Fitzpatrick had told him about her conversation with Van Wagenen. They immediately walled themselves off from any involvement in defendant's case. Bentley immediately notified Delimon that he was not to have contact with Fitzpatrick, Tate, Haringsma and Hestrin. Tate met with the prosecutors and helped them prepare their declarations in anticipation of an in camera hearing.

Delimon also submitted a declaration. He had not spoken with Fitzpatrick about the case since April 4, 2011. Delimon was advised by Bentley and Tate that Fitzpatrick was walled off from the case beginning April 6, 2011; he was not told why. He was advised also not to speak with Hestrin and Haringsma about the case.

On July 11, 2011, the California Office of the Attorney General filed an opinion as to the recusal motion. It noted that the facts were not in dispute. It opposed the motion because there was no showing of a conflict of interest that would render it unlikely that defendant could receive a fair trial. Further, Delimon was walled off from the information.

On July 18, 2011, Tate filed opposition to the recusal motion on behalf of the DA's office. The DA's office argued that the recusal of the entire office was unnecessary because there was no showing that the recusal of the entire office was necessary to avoid an unfair trial. The DA's office argued that an evidentiary hearing was unnecessary because the facts were not disputed. Further, since defendant's counsel had revealed the

information in an unsealed motion, it was only necessary to exclude Van Wagenen.[11] The reasons for not allowing Hestrin, Haringsma, Tate and Fitzpatrick from participation were no longer relevant.

Fitzpatrick also submitted a declaration in support of the opposition. She declared she had no contact with Delimon regarding defendant's case since the interaction with Van Wagenen. Even before Van Wagenen advised her of the PTSD defense, she had investigated the PTSD defense. Delimon had been served with the recusal motion that was not initially filed under seal by defendant's counsel; he did not read it. Since the information had been made public, there was no need to wall off Fitzpatrick.

The matter was heard on September 9, 2011.[12] The trial court stated it had read the motion and the People's opposition. It reviewed the additional declaration provided by Fitzpatrick. There was no additional argument.

The trial court stated that the issue of recusal was governed by section 1424 and that barring the entire DA's office from prosecuting a case was a serious step. Further, disqualification of an entire prosecutor's office was disfavored absent a substantial reason related to the proper administration of justice and the court should consider less drastic measures. The trial court referred to *People v. Gamache* (2010) 48 Cal.4th 347 (*Gamache*) a case involving a defendant who sought to recuse the entire San Bernardino

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[11] Defendant's counsel mistakenly did not file the motion and declarations under seal.

[12] The recusal motion was heard by Judge F. Paul Dickerson III.

County District's Attorney's Office. The high court found there was an effective walling off of the employee in that case.

The trial court then denied the motion as follows: "As in *Gamache*, the Riverside County D.A.'s office is one of the largest in the state with at least that many employees, and probably a great deal more. Furthermore, as in *Gamache*, a screening policy has been put in place to ensure that individuals who have had contact with the case and who were previously defense attorneys be walled off from any matters with which they were previously connected. [¶] What is clear to this Court is that this policy worked perfectly, based on the declarations the Court has now read. The individuals involved all immediately took steps to keep those with knowledge of what was said to a minimum and sought advice on how to proceed. Strict orders were given to the [deputy district attorneys] already working on the case that they be excluded from further participation in the matter and not to talk about it with anyone. [¶] Furthermore, the declaration of the actual [deputy district attorneys] in charge of prosecuting the case had no idea what was said or to whom the statements were made. In short, [deputy district attorney] Delimon cannot use any statements made by former attorneys for the defendant because he had no idea, at least at that time, what the statements were, and those in his office who do know what was said are precluded from discussing them further. That is in essence of a wall. Find out who knows what and separate them immediately. That was done here. [¶] In sum, in the opinion of this Court, there is absolutely no evidence that the defendant could not receive a fair trial if the Riverside County D.A's Office remained on the case. To relieve the entire office would be, as the Courts have said, a drastic step that should not

be taken absent clear evidence there is a likelihood that the defendant could not receive a fair trial. No such evidence is present in this case, and so the Court will decline the motion."

Tate then argued that there had been a prior order by the court that Fitzpatrick, Haringsma, Hestrin and himself could not be involved in the case. However, Tate stated that since that time, defendant's counsel had failed to file the recusal motion under seal. As such, the information that was known from Van Wagenen was now public information. Additionally, the prosecution had already anticipated the PTSD defense; and it would have to be disclosed prior to trial anyway.

Defendant's counsel objected to the ruling because the DA's office had not successfully walled off Van Wagenen from the case prior to the disclosure. The problem was exasperated by Fitzpatrick disseminating the information. The trial court lifted the order for everyone except Van Wagenen. The trial court advised defendant's counsel that the order would be stayed until he had a chance to file a writ of mandate challenging the ruling. If no writ was filed within two weeks, the stay of the order denying the recusal motion and the exclusion of all the prosecutors except Van Wagenen would be lifted. Defendant admits that he did not file a writ.[13]

B. *ANALYSIS*

"Under section 1424, a motion to recuse a prosecutor 'may not be granted unless the evidence shows that a conflict of interest exists that would render it unlikely that the

[13] The People have not argued, and this court has found no case law to support, that the matter has been waived based on defendant's failure to file a writ of mandate.

defendant would receive a fair trial.' [Citation.] 'The statute "articulates a two-part test: '(i) is there a conflict of interest?; and (ii) is the conflict so severe as to disqualify the district attorney from acting?' " ' [Citation.] The defendant 'bear[s] the burden of demonstrating a genuine conflict; in the absence of any such conflict, a trial court should not interfere with the People's prerogative to select who is to represent them.' [Citation.] That burden is especially heavy where . . . the defendant seeks to recuse not a single prosecutor but the entire office." (*People v. Trinh* (2014) 59 Cal.4th 216, 229.)

"The statute demands a showing of a real, not merely apparent, potential for unfair treatment, and further requires that that potential 'rise to the level of a *likelihood* of unfairness.'" (*People v. Vasquez* (2006) 39 Cal.4th 47, 56 (*Vasquez*).) "[W]here the record on the recusal motion indicates that the conduct of any deputy district attorney assigned to the case, or of the office as a whole, would likely be influenced by the personal interest of the district attorney or an employee, the motion is properly granted." (*Id*. at p. 57.)

We "must determine whether the trial court's findings were supported by substantial evidence and whether, in turn, those findings support the decision to deny recusal." (*Gamache*, *supra*, 48 Cal.4th at pp. 361-362.) Here the facts were undisputed. The trial court made no explicit findings on questions of evidentiary fact. Our review is limited to determining if the trial court abused its discretion, while assuming the court relied on any substantial evidence that tends to support its ruling. (*People v. Eubanks* (1996) 14 Cal.4th 580, 594.)

It is not disputed that Van Wagenen had a conflict of interest. He had represented defendant for several months prior to trial before being hired by the DA's office. He was privy to confidential attorney/client communication and admitted he had developed a defense strategy. "However, the possibility that a prosecutor might be influenced does not alone establish the requisite likelihood or probability that a defendant will be treated unfairly." (*Gamache*, *supra*, 48 Cal.4th at p. 363.) The only issue is whether there was a likelihood of unfair treatment by the DA's office due to Van Wagenen's prior representation of defendant.

There is no evidence that the conflict in this case was so severe that defendant would receive unfair treatment from the DA's office. Van Wagenen did not express a strong feeling regarding the prosecution of the case or disclose sensitive information about the case; Fitzpatrick had already anticipated the defense. Van Wagenen submitted a declaration that he had made a mistake and that he would not have any further contact with any of the prosecutors in the office about the case. Van Wagenen never had any contact with Delimon. Van Wagenen was ordered not to participate in the case. Delimon had no knowledge of the information and Van Wagenen was not supervising Delimon. There is nothing in the record that supports that defendant would receive unfair treatment from Delimon or the DA's office.

Defendant points to the fact that the ethical screen that was established in this case did not work. In *Gamache*, *supra*, 48 Cal.4th 347, a recusal of the entire San Bernardino County District Attorney's Office was sought because a surviving victim of the defendant's crime worked in a branch of the district attorney's office. The high court

looked to the size of the office and the fact that the division to which the employee was assigned was walled off from the case. (*Id.* at pp. 361, 363-365.) The court emphasized the fact that an effective ethical screen was established in finding the motion for recusal was properly denied. (*Ibid*.)

While it is true that when Van Wagenen was hired, he had been ordered to not have any involvement in defendant's case; he disclosed a small part of his defense theory to Fitzpatrick. However, this does not establish that an ethical screen could not be successful in the future. Van Wagenen acknowledged the mistake. Fitzpatrick immediately disclosed the information to her supervisor. As noted by the trial court, "[deputy district attorney] Delimon cannot use any statements that were made by former attorneys for the defendant because he had no idea, at least at that time, what the statements were, and those in his office who do know what was said are precluded from discussing them further. That is in essence of a wall. Find out who knows what and separate them immediately. That was done here." Delimon was walled off from Van Wagenen immediately, and he had had no previous contact with him. There is no indication that the screen in place would not be effective.

Moreover, "Recusal is not a mechanism to punish past prosecutorial misconduct. Instead, it is employed if necessary to ensure that *future* proceedings will be fair. '[S]ection 1424 does not exist as a free-form vehicle through which to express judicial condemnation of distasteful, or even improper, prosecutorial actions.'" (*People v. Bryant* (2014) 60 Cal.4th 335, 375.) Here, the issue was whether defendant would receive unfair

treatment by the DA's office. Van Wagenen declared that he would make no further disclosures and he was walled off from the case.

Further, the motion was properly denied as to the entire office and Fitzpatrick. It was clear that Fitzpatrick would have no further contact with Van Wagenen about the case. The information she did know became public when defense counsel filed the recusal motion but failed to request that it be filed under seal. Fitzpatrick showed she was not afraid to disclose the mistake made by a superior. The trial court did not abuse its discretion by denying defendant's motion to recuse the DA's office, or even Fitzpatrick.

Defendant also argues, relying upon *People v. Lepe* (1985) 164 Cal.App.3d 685 (*Lepe*), that since Van Wagenen was a "high-ranking" member of the DA's office and had supervisory power over Fitzpatrick, recusal of the entire DA's office, or Fitzpatrick, was required. In *Lepe*, the District Attorney of Imperial County, Thomas W. Storey, had previously represented the defendant in two criminal cases. In the defendant's new criminal case, he sought to recuse the entire Imperial County District Attorney's office. Defendant's lawyer represented that part of the new case would involve the adequacy of Storey's representation in the prior cases and that he may call Storey as a witness. The motion was granted. (*Id.* at pp. 686-687.) The appellate court concluded that there was a conflict of interest and then assessed whether the defendant could receive a fair trial. It found, "Here, Storey would be inclined vigorously to amend the information to include the prior and to uphold its validity against [the defendant]'s contention of constitutional infirmity for lack of proper lawyering by Storey. His prosecution of the charged offenses

necessarily would be influenced by his knowledge of the victims and of [the defendant], garnered during the earlier representations. The 'evenhanded' manner required of the prosecution is missing. Storey's hand on the tiller of the prosecution, his hand on one of the scales of justice, is not the even hand required to assure justice-the end result of a criminal prosecution. [¶] As the deputies are hired by Storey, evaluated by Storey, promoted by Storey and fired by Storey, we cannot say the office can be sanitized such to assume the deputy who prosecutes the case will not be influenced by the considerations that bar Storey himself from participation in the case." (*Id.* at pp. 688-689.)

The situation in this case is nothing like that in *Lepe*. Initially, Van Wagenen had only represented defendant prior to trial on this case, and there was no indication that Van Wagenen would become a witness in the case. Although he was privy to confidential information, unlike Storey in *Lepe* he had no personal interest in seeing defendant prosecuted. Moreover, there is nothing in the record to support that he had any supervisory role over Delimon, who was in the trial division. Although Van Wagenen oversaw the Appeals and Writs section of the DA's office, to which Fitzpatrick was assigned, it was clear that she would report any disclosures as she did in this case, and that Van Wagenen had been ordered by the trial court to have no contact with her. Van Wagenen was ordered walled off from the case and it is pure speculation on defendant's part that any further disclosures would be made.

Defendant contends that his due process rights under the federal Constitution were denied by the trial court's refusal to grant his recusal motion. However, "[S]ection 1424's recusal standards are prophylactic in nature and 'serve[] to prevent potential

constitutional [due process] violations from occurring.' [Citation.] If recusal was properly denied under section 1424, ipso facto no due process violation occurred." (*Gamache*, *supra*, 48 Cal.4th at p. 366.)

Additionally, we find that defendant has not shown prejudice. A trial court's violation of section 1424 does not entitle defendant to reversal on appeal "without a showing of prejudice." (*Vasquez*, *supra*, 39 Cal.4th at p. 68.) In *Vasquez*, the court stated that "[r]elief from an erroneous denial under section 1424 is available by pretrial writ petition." It noted the defendant in that case did not seek such a writ, like defendant in this case. As such, it required that the defendant show "actual prejudice" in order to obtain reversal on appeal. (*Id*. at pp. 68-70.)

Here, defendant has made no attempt to show prejudice. Rather, he argues that such violation of his due process rights were so egregious that automatic reversal as structural error is necessary. This case is akin to *Vasquez*, *supra*, which required a showing of actual prejudice based on the defendant's failure to file a writ petition. We have reviewed the record and found no indications that defendant received unfair treatment by the DA's office. Defendant has failed to meet his burden of showing that he suffered actual prejudice based on the DA's office prosecuting his case. The motion to recuse the DA's office was properly denied.

B. CROSS-EXAMINATION OF MILLER

Defendant contends that his fundamental rights to confrontation and a fair trial were violated when the trial court refused to allow him to cross-examine Miller as to

numerous unadjudicated burglaries Miller committed, to buttress defendant's defense that he had only a minor role in the charged crimes.

1. *ADDITIONAL BACKGROUND*

Prior to trial, the People brought a motion in limine to admit evidence of prior crimes pursuant to Evidence Code section 1101, subdivision (b), to prove intent. Items were found in Miller's house that tied him to other burglaries. The prosecutor noted that these would involve short testimony by five or six witnesses. As part of this motion, the People sought to admit the Oceanside robbery, which the prosecutor argued mirrored the instant case.

Miller's counsel agreed that there was no argument about excluding the Oceanside robbery. However, as to several unadjudicated burglaries involving Miller, they were cumulative and would have the effect of prejudicing the jury. Defendant's counsel also argued against the admission of Miller's burglaries. The burglaries and Oceanside robbery did not go to any material fact that needed to be proven by the People and had minimal probative value.

The trial court first stated that "on paper," with the party admissions, the case against defendant and the others was very strong. The Oceanside robbery had relevancy to the homicides. However, the burglaries did not have anything in common with the instant case. There was some probative value, but would be more prejudicial than probative. The trial court admitted the Oceanside robbery; the burglary evidence was out.

During the examination of the officer who executed the search warrant at Miller's residence, there were three passports found that did not belong to any of the residents. The passports belonged to the victims of the prior burglaries committed by Miller. The People sought to admit the passports to show that Miller's residence was a burglary/robbery operation. The trial court acknowledged that the evidence was "extremely" relevant, but also "extremely" prejudicial. It ruled, "I will not permit any questioning into any of these items of stolen property unless the items are the Pietrzaks' property."

Prior to Miller testifying, defendant's counsel stated that he might want to cross-examine Miller regarding being shot by Weissinger. Miller's counsel was concerned it would open up evidence that Miller and Weissinger were on their way to commit another burglary. The trial court initially stated the information could not be discussed. Defendant's counsel responded, "I understand, your Honor, but I think that it denies my client's right to a full and fair cross-examination to not be able to go into these issues. We can do it in front of my jury only." The trial court responded, "No, we're not going to do that. If he takes the stand, everybody gets to hear his testimony . . . and your argument is exactly the argument that defense counsel's made in all these cases. He has a privilege, pure and simple. He has a privilege because these have been unadjudicated, uncharged—I don't know if they've been charged or not, but he hasn't been convicted. He has a privilege to refuse to answer questions related to those." Miller would assert the privilege.

Defendant's counsel then brought up the issue that it had been three years since the last burglary; the statute of limitations had run on the prior burglaries. The trial court noted that "reasonable discovery" extended the statute of limitations. The trial court reiterated that Miller had a privilege. Further, the trial court was concerned about "mini trials" on these unadjudicated burglaries. The trial court ruled there would be no cross-examination on the burglaries. Defense counsel again argued that defendant was being denied his right to a full and fair cross-examination on his credibility.

The trial court ruled there would be no cross-examination of Miller on the other burglaries and home invasion robberies; under some theory, there still may be a statute of limitations that had not run. Further, it was risky to cross-examine Miller as it was unclear if he would implicate defendant in the other burglaries and home invasion robberies. Further, "the potential for this evolving into a series of mini trials on collateral issues, and thus, taking up an incredible amount of time is very real." Miller testified as set forth in detail *ante*.

After extensive cross-examination of Miller by the prosecutor, the parties again addressed the unadjudicated burglaries and the trial court again stated those were not admissible. Defendant's counsel requested that Miller's testimony be stricken if defendant was not allowed to fully cross-examine him. Further, defendant's counsel argued that Miller's counsel had opened the door to the burglaries by saying Miller did not trust Weissinger because of all the crimes that Weissinger had committed, and in relation to Miller being shot. The trial court agreed to allow defendant's counsel to ask about the time that Miller was shot and what he and Weissinger were doing at the time.

2. *ANALYSIS*

The confrontation clause is not implicated when the codefendant testifies and the defendant has had an opportunity to confront and cross-examine the codefendant. (*People v. Dement* (2011) 53 Cal.4th 1, 23-24.) However, "[T]he right to confront and to cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process." (*Chambers v. Mississippi* (1973) 410 U.S. 284, 295.)

"'[I]mpeachment evidence other than felony convictions entails problems of proof, unfair surprise, and moral turpitude evaluation which felony convictions do not present.' [Citation.] Courts should, under Evidence Code section 352,[14] 'consider with particular care whether the admission of such evidence might involve undue time, confusion, or prejudice which outweighs its probative value.'" (*People v. Lucas* (2014) 60 Cal.4th 153, 240.) "'A trial court's ruling to admit or exclude evidence offered for impeachment is reviewed for abuse of discretion and will be upheld unless the trial court "exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice."'" (*Ibid*.)

Here, defendant initially sought to exclude the unadjudicated burglaries prior to Miller testifying, recognizing that they were potentially prejudicial and had "minimal" relevance. However, once Miller testified and painted defendant as a major participant in

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14 Evidence Code section 352 provides that "[t]he court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

the crimes, defendant sought to admit the burglaries. These other burglaries were only marginally relevant to impeach Miller. The evidence already established that Miller was the mastermind behind going to the Pietrzak's house. Further, during the search, Janek's blood was found on Miller's bandana, and Miller's gloves contained Quiana's DNA. Miller ordered John to kill Quiana and Janek. Buck had testified that Miller said John had earned his stripes the night the Pietrzaks were murdered. Miller's credibility was already suspect based on him being substantially involved in the murder and sexual assault in this case.

Additionally, Weissinger testified that Miller was armed during the Oceanside robbery and was a major participant. Finally, Weissinger had testified that he and Miller were heading to commit another burglary when his gun accidently discharged and shot Miller.

The jury was well aware that Miller was involved in numerous criminal endeavors. The fact that he may have been involved in other burglaries prior to the murder of the Pietrzaks had minimal relevance as to Miller's credibility. The jury reasonably would already be critical of Miller's testimony based on his criminal activity and as a major participant in the instant murders.

Additionally, the trial court properly determined that the introduction of the unadjudicated burglaries would result in an undue consumption of time. The prosecutor stated that it would call five to six witnesses to testify about the unadjudicated burglaries. This was already a lengthy trial for the jurors. The trial court's determination that "mini trials" on the burglaries would result in an undue consumption of time was not an abuse

of discretion and the evidence was properly excluded pursuant to Evidence Code section 352.

Defendant contends that he did not have the "important impeachment evidence . . . which would have given the jury an entirely different view of Miller and his credibility and contrasted him with [defendant]." The addition of the burglaries would not have given the jury an entirely different view of Miller.

Even if the trial court erred by disallowing further impeachment evidence, "it would be harmless under any standard. (*Chapman v. California* (1967) 386 U.S. 18, 24, [] [constitutional error must be assessed for prejudice under the harmless beyond a reasonable doubt standard]; *People v. Watson* (1956) 46 Cal.2d 818, 836, [] [error is harmless under state law unless it is reasonably probable that a result more favorable to defendant would have occurred absent error].)" (*People v. Lucas, supra*, 60 Cal.4th at p. 242.)

As stated, Miller was already impeached with the fact he was involved in the Oceanside robbery, and was on his way to commit another burglary with Weissinger after the murders. Additionally, the jury was instructed that it must determine whether Miller was an accomplice. They were instructed that if it found Miller was an accomplice, then the jury could not convict defendant of murder based on Miller's statement or testimony alone. There must be other evidence independent of the accomplice's testimony in order to convict defendant. The jury was also advised that any statement or testimony by an accomplice "should be viewed with caution."

It is inconceivable that the jury did not find Miller was an accomplice. Further, there is evidence that the jury did not believe Miller. Miller provided the only witness testimony that defendant was involved in the sexual assault of Quiana. The jury found the special circumstance of sexual assault charged against defendant not true. As such, it was clear the jury did not believe all of Miller's testimony.

Finally, the evidence of defendant's guilt was overwhelming. Defendant at first denied that he went to the Pietrzak's house. He then stated that he went to the house, but stayed outside. He then progressed to advise the police that he was enlisted to ring the doorbell and that he went inside to help carry out items. His claim of limited involvement was belied by other evidence. Buck overheard defendant say to John and Miller that John had earned his stripes and done a good job. Defendant had given Quiana's wedding rings to Buck. Defendant had been involved in the prior Oceanside robbery in which he hit Thomasen and helped steal items.

The evidence overwhelmingly established that defendant was a major participant in the robbery, burglary and murders of Quiana and Janek. Although he did not pull the trigger, he acquiesced in the killing, heaping praise on John for doing a good job. He had no regrets about taking Quiana's property as shown by him giving the rings to Buck. The evidence overwhelming established defendant's guilt without Miller's testimony.

C. INSTRUCTIONAL ERROR FOR PRIOR ACTS EVIDENCE

Defendant contends that the trial court erroneously instructed the jury with CALCRIM No. 375, that it could consider the prior Oceanside robbery to show defendant's intent, motive and common plan and scheme to commit murder. Although

defendant acknowledges that his trial counsel never objected to the instruction, he claims if he forfeited his claim, he received ineffective assistance of counsel.

1. *ADDITIONAL BACKGROUND*

At the time of discussion of the instructions, the prosecutor requested that CALCRIM No. 375 include language regarding common plan and scheme. The language already included intent and motive language. The prosecutor stated, "Obviously, the similarities between the first home invasion robbery and the second home invasion robbery I believe is relevant." The trial court agreed to the common plan language. There was no objection by defense counsel as to the intent to commit murder.

The jury was instructed, "During the trial, certain evidence was admitted for a limited purpose. You may consider that evidence only for that purpose and for no other. [¶] I will amplify on that with this instruction: The People presented evidence that the defendant committed another offense that was not charged in this case—referring to the alleged Oceanside home invasion robbery charge. [¶] You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant in fact committed the uncharged offense. Proof by a preponderance of the evidence is a different burden of proof than proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true. [¶] If the People have not met this burden, you must disregard this evidence entirely. [¶] If you decide that the defendant committed the uncharged offense, you may, but are not required to, consider that evidence for the limited purpose of deciding whether or not: [¶] The defendant acted with the intent to commit murder, robbery, burglary,

and/or sexual penetration with a foreign object in this case; or [¶] The defendant had a motive to commit the offenses charged in this case; or [¶] The defendant had a plan or scheme to commit the offenses alleged in this case. [¶] In evaluating this evidence, consider the similarity or lack of similarity between the uncharged offense and the charged offenses. [¶] Do not consider this evidence for any other purpose except for the limited purpose that I've just described to you. [¶] Do not conclude from this evidence that the defendant has a bad character or is disposed to commit crime. [¶] If you conclude that the defendant committed the uncharged offense, that conclusion is only one factor to consider along with all of the other evidence. It is not sufficient by itself to prove that the defendant is guilty of the crimes charged or that the special circumstances have been proved. The People must still prove each charge and allegation beyond a reasonable doubt."

2. *ANALYSIS*

It is true that the prior Oceanside robbery did not involve murder of the victims and could not be considered to show defendant's intent to commit murder in this case. However, the People argue that defendant forfeited his claim of error by failing to object to, or request a modification of, the challenged portion of the instruction in the trial court. Generally speaking, a trial court has no sua sponte duty to give a limiting instruction or to revise or clarify an instruction that accurately states the law. (See *People v. Lee* (2011) 51 Cal.4th 620, 638; *People v. Jones* (2003) 30 Cal.4th 1084, 1116.) However, if the trial court does give a limiting instruction on uncharged acts, it must do so accurately, and should limit the issues upon which such evidence may be considered by striking from the

instruction the issues upon which the evidence is not admissible. (*People v. Key* (1984) 153 Cal.App.3d 888, 899.)

In any event, any error in instructing the jury was clearly harmless. Any error in including intent to commit murder in CALCRIM No. 375 did not prejudice defendant, because it is not reasonably probable he would have obtained a more favorable result in the absence thereof. (*People v. Watson*, *supra*, 46 Cal.2d at p. 836; see also *People v. Foster* (2010) 50 Cal.4th 1301, 1332-1333 [applying *Watson* standard to erroneous instruction that jury could consider evidence of defendant's prior crimes with respect to issue of identity of perpetrator, and observing that, because evidence was admissible regardless of whether it was relevant to issue of identity, jury would have heard it even if trial court had not admitted it to establish defendant's identity as perpetrator].)[15]

Defendant does not contend the Oceanside robbery was improperly admitted. Nor does he argue the jury was improperly instructed that it showed his intent, motive and common plan and scheme to commit robbery and burglary. The jury was also instructed on aiding and abetting. It was advised that if defendant was aiding and abetting one crime, he was guilty of other crimes committed during the commission of the first crime. The Oceanside robbery was properly considered in assessing defendant's guilt of felony murder. The evidence was overwhelming that defendant had the intent to commit

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[15] The instruction did not deny defendant his right to a fair trial. Any error in the instruction's reference to the evidence as relevant to prove defendant's intent to commit murder, "did not 'infect[] the entire trial.'" (*People v. Foster*, *supra*, 50 Cal.4th at p. 1335.)

robbery and burglary, and that the Pietrzaks were killed during the commission of these crimes.

Moreover, the jury was instructed that first degree murder was based on either premeditated and deliberate murder, or based on the felony murder rule. They were also instructed as to the special circumstances, that defendant had to possess the intent to kill, or acted with reckless indifference to life in committing the underlying crimes, even if he was not the direct perpetrator. The evidence established that defendant had the intent to commit murder. Defendant went to the Pietrzak's house with three other men. Some of them had guns. The victims were tied up and forced to the ground. He advised John after the murder that John had earned his stripes and done a good job murdering the Pietrzaks. The jury could reasonably infer that defendant had the intent to kill based on the totality of the evidence, and not based on the Oceanside robbery.

In addition, the jury was instructed that it could not use the Oceanside robbery to conclude defendant had a bad character or was disposed to commit a crime, and that the evidence was insufficient, by itself, to establish defendant's guilt. We presume the jury followed the instructions (*People v. Mooc* (2001) 26 Cal.4th 1216, 1234) and found defendant guilty based on the entirety of the evidence.

D. SPECULATIVE EVIDENCE REGARDING SEXUAL GESTURE

Defendant contends that the trial court erred by admitting the testimony of Gallego regarding defendant being present just after the murders when John made what appeared to be a sexual gesture and defendant laughed. Defendant additionally claims that the trial court erred by denying his motion for mistrial when evidence was elicited as

to what Gallego thought the gesture described, evidence that the trial court had ruled should not be admitted.

1. *BACKGROUND*

Prior to trial, an Evidence Code section 402 hearing was held at which Gallego testified regarding the sexual gesture made by John in defendant's presence.[16] Gallego described the gesture as "All right. Here's a pussy, and then they were fucking it with something. I'm pretty sure that's what it was." The prosecutor argued that the hand gesture should be admitted; it was up to the jury to decide if it related to the murders or not. It was relevant to show defendant's intent. Defendant's counsel argued under Evidence Code section 352 that it was too vague.

The trial court found that the gesture was relevant. The trial court restricted the testimony to what Gallego saw but he could not testify as to what he thought the gestures meant.

During Gallego's testimony, the prosecutor asked, "Now, the gestures that you saw, correct, prior to January of 2009 when you were being interviewed and asked the questions about whether you had ever seen any conversation between—having to do with Pietrzak's death, had you learned at some point that Sergeant Pietrazak's wife had been sexually assaulted?" Gallego responded, "I knew." Defendant's counsel objected, "Objection. 352." The objection was overruled. The prosecutor then asked, "So based on what you knew about the fact that his wife had been sexually assaulted, is that why

[16] Gallego first stated that it was John and Miller making these gestures but then clarified that it was defendant and John.

these gestures stood out?" Defendant's objection was sustained. The prosecutor again asked, "Why did these gestures stick out in your mind?" Defendant's counsel stated, "Objection, your Honor, to the question. Calls for inadmissible evidence." The trial court ruled, "The Court has already ruled on this. The objection is sustained." The prosecutor asked Gallego what words he used to describe what he saw. Gallego said, "It looked like a pussy, and they were fucking it with something." There was no objection.

After Gallego's testimony, defendant's counsel objected that Gallego was not supposed to state what he thought the gestures meant. The trial court reviewed the transcript from the pretrial ruling.

The trial court stated, after reading the transcript, "And relying on a firmly rooted common law doctrine known as 'the Court screwed up,' the Court screwed up. I made a mistake. I'm embarrassed by it." The trial court then stated, "I feel somewhat redeemed, however, when I said this morning that the answer that came in came in without objection. I was correct. The three questions leading up to the question, I sustained. But the question on page 7, line 14, Question: 'What words did you use to describe what you saw?' No objection. Answer at line 16: 'It looked like a pussy, and they were fucking it with something.' No objection. No motion to strike." The trial court noted it was "pretty clear I said no opinions." The trial court noted that if the answer came in on its own, there would be no problem. However, "I can't ignore the fact that he was at some point asked if he became aware that Quiana had been raped. And I think I have to look at this in the context of the description that he gave and his acknowledgment that he became aware of the sexual assault." The trial court then stated "The Court should not have

allowed that answer to stand even though it came in without objection. I probably should have stricken it when it came in and instructed the jury to disregard it."

Defendant's counsel brought a motion for mistrial. Defense counsel argued, "And because of that, yes, I'd make a motion for mistrial. I don't see how any curative instruction can help that. I think it's a horrible amount of prejudice, whether it was intended or not." If the trial court was not willing to have a mistrial on the entire case, the special circumstance regarding sexual penetration by a foreign object should be dismissed.

The trial court ruled, "The motion for mistrial—overall mistrial is denied. The motion for mistrial as to the special circumstance is denied. I'm going to instruct the jury to disregard the observations, that they're not to consider it. And I have to trust that they will follow the Court's instruction." The trial court stated, "But while the mistake is mine, I don't think it is serious enough or prejudices [defendant] to the degree that it warrants a mistrial. So for those reasons, the motion is denied."

The trial court instructed defendant's jurors: "The Court will instruct you at this time that you are to disregard the answer in response to the following question asked by [the prosecutor]: 'What words did you use to describe what you saw?' 'Answer: it looked like a pussy, and they were fucking it with something.' You're to disregard that. You are to disregard that opinion. You are, of course, permitted to consider the remainder of the witness's testimony as it was presented this morning."

The jury was again instructed prior to the case going to the jury: "During the trial, the attorneys may have objected to questions or moved to strike answers given by the

witnesses. I ruled on the objections according to the law. If I sustained an objection, you must ignore the question. If the witness was not permitted to answer, do not guess what the answer might have been or why I ruled as I did. If I ordered testimony stricken from the record, you must disregard it and must not consider that testimony for any purpose."

2. *ADMISSION OF SEXUAL GESTURE*

"No evidence is admissible except relevant evidence." (Evid. Code, § 350.) """Relevant evidence is defined in Evidence Code section 210 as evidence 'having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.' The test of relevance is whether the evidence tends '"logically, naturally, and by reasonable inference" to establish material facts such as identity, intent, or motive. [Citations.]' [Citation.] The trial court has broad discretion in determining the relevance of evidence [citations] but lacks discretion to admit irrelevant evidence."'" (*People v. Carter* (2005) 36 Cal.4th 1114, 1166-1167.)

The evidence of the gesture made by John was clearly relevant. Defendant was in the presence of John just after the murders. The jury could reasonably infer from the gesture made that they were discussing what happened to Quiana. This evidence is relevant to show defendant's intent as an aider and abettor and his involvement in the sexual assault. Moreover, the evidence was not more prejudicial than probative. (Evid. Code, § 352.) This brief testimony was not more inflammatory or damaging than other evidence admitted involving defendant's actions in this case.

Moreover, even if the trial court erred, defendant cannot possibly show he was prejudiced. "[T]he admission [or exclusion] of evidence, even if erroneous under state

law, results in a due process violation only if it makes the trial fundamentally unfair." (*People v. Partida* (2005) 37 Cal.4th 428, 439, italics omitted.) Absent federal constitutional error, the standard of prejudice for the erroneous exclusion of evidence is the harmless error test in *People v. Watson, supra,* 46 Cal.2d at page 836. (*Partida,* at p. 439.)

Here, the admission of the sexual gesture was clearly harmless and did not render the trial fundamentally unfair. This evidence was admitted by the People to show that defendant was involved in the sexual assault of Quiana. However, the jury found the sexual assault special circumstance not true. Further, this evidence no more painted defendant as a "cruel, callous person" who found the murders funny, than the fact he told John that he had earned his stripes and done a good job. Further, defendant himself stated that he walked into the house and saw Quiana naked and Janek with a gun to his head but he did nothing. He grabbed the items to be taken and left the house. His own testimony shows that he had no empathy for the victims. Finally, the nature of the crimes themselves was so "cruel" and "callous" that the jury clearly saw all of the defendants in a negative light. Defendant has not shown prejudice under any standard.

3. *MOTION FOR MISTRIAL*

Defendant additionally contends that the trial court erred by denying his motion for mistrial based on Gallego describing what he thought the sexual gestures meant in the context of discussing whether he was aware that Quiana had been sexually assaulted.

The court did not abuse its discretion in denying the motion for a mistrial. "'A mistrial should be granted if the court is apprised of prejudice that it judges incurable by

admonition or instruction. [Citation.] Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions. [Citation.]' [Citation.] A motion for a mistrial should be granted when '"'a [defendant's] chances of receiving a fair trial have been irreparably damaged.'"'" (*People v. Collins* (2010) 49 Cal.4th 175, 198.)

Here, the trial court recognized the admission of the evidence it had excluded and twice admonished the jury to disregard the evidence. We presume that the jury followed the instruction. (*People v. Mooc*, *supra*, 26 Cal.4th at p. 1234.) Moreover, as set forth *ante*, there was no incurable prejudice as the sexual assault special circumstance was found not true, and other admissible evidence cast defendant as a "cruel" and "callous" person. The motion for mistrial was properly denied.

E. CUMULATIVE ERROR

Finally, defendant claims that if the errors raised standing alone do not constitute reversible error, the cumulative errors warrant reversal.

Reversal may be required when the cumulative effect of serious trial errors made at trial amounted to a miscarriage of justice. (See *People v. Hill* (1998) 17 Cal.4th 800, 844.) "Lengthy criminal trials are rarely perfect, and this court will not reverse a judgment absent a clear showing of a miscarriage of justice." (*Id.* at p. 844.) We have rejected each claimed error, or found them harmless when considered separately. We similarly conclude that their cumulative effect does not warrant reversal of the judgment. (*People v. Bolden* (2002) 29 Cal.4th 515, 567-568.)

DISPOSITION

Defendant's convictions are affirmed in full.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

MILLER
J.

We concur:

McKINSTER
Acting P. J.

KING
J.